

U.S. Supreme Court, U. S.

FILED

JUN 1 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1938

No. 582

ELECTRICAL FITTINGS CORPORATION, JOSELSON
SALES CORPORATION, SAMUEL JOSELSON AND
BELLE JOSELSON

Petitioners

v.

THE THOMAS & BETTS CO. AND NATIONAL
ELECTRIC PRODUCTS CORPORATION

Respondents

**MOTION BY RESPONDENTS TO TAX COSTS
AGAINST PETITIONERS, AFFIDAVIT AND
NOTICE OF SUBMISSION**

GEO. WHITEFIELD BETTS, JR.
WILLIAM BOHLEBER
FRANCIS H. FASSETT

Counsel for Respondents



IN THE

Supreme Court of the United States

ELECTRICAL FITTINGS CORPORATION, JOSEL-
SON SALES CORPORATION, SAMUEL JOSEL-
SON and BELLE JOELSON,

Petitioners,

v.

THE THOMAS & BETTS CO. and NATIONAL
ELECTRIC PRODUCTS CORPORATION,

Respondents.

No. 582

Motion by Respondents to Tax Costs Against Petitioners

Now come respondents, pursuant to leave granted in open Court on May 29, 1939, and move to tax the costs of the above entitled case in this Court as well as in the Court below against petitioners upon the grounds

- (1) that while the case was pending in the District Court petitioners *approved as to form* the decree (R. 276) which, on May 22, 1939, was reversed by this Court. (See affidavit of Francis H. Fassett, Esq. attached hereto, and the endorsement on the decree itself, R. 277.)
- (2) that the first intimation respondents had that petitioners objected to the mere form of the decree was at the argument before this Court on April 19, 1939,
- (3) that in their assignment of errors in the Circuit Court of Appeals (R. 292-4) upon which petitioners relied for their prosecution of the appeal in the above entitled cause, petitioners did not

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assign any error as to the form of the decree entered by the District Court although there are 14 other errors assigned all of which go to the merits of the case, and

- (4) that at the argument before this Court on April 19, 1939 petitioners, in response to a question by one of the Justices of this Court, admitted that no application had been made either to the Court below or to the District Court to correct the form of the decree entered by the latter.

That the petitioners were not concerned with the mere form of the decree will be readily apparent from the conclusion at page 16 of "Brief for Petitioners" in this Court, as follows:

"It is submitted, therefore, that the question presented should be answered in the affirmative, the judgment of the Second Circuit Court of Appeals reversed, *and the case remanded to that Court with instructions to reinstate petitioners' appeal and pass on the merits thereof.*" (Emphasis ours.)

and from the conclusion at page 5 of the "Reply Brief for Petitioners" in this Court, as follows:

"The question presented should be answered in the affirmative and the judgment of the Second Circuit Court of Appeals reversed, *and the cause remanded to that Court with instructions to reinstate petitioners' appeal and to pass on the merits thereof.*" (Emphasis ours.)

In support of this motion respondents submit herewith an affidavit of Francis H. Fassett, Esq., one of the attorneys for respondents throughout this litigation.

This motion is brought by respondents because Rule 32 of this Court does not specifically cover the question of costs in a case like this where the judgment of the lower Court (R. 276) is reversed by this Court not as to the

merits but as to the mere form of the decree, and the cause remanded to that Court with instructions to entertain the appeal to the extent only that it direct the District Court to reform its decree in accordance with the views expressed by this Court in its decision of May 22, 1939.

As petitioners have failed upon the merits of their appeal it is submitted that all costs in this Court and the Court below should be awarded against them. *C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 387, and *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 392.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
WILLIAM BOHLEBER,
FRANCIS H. FASSETT,
Counsel for Respondents.

Dated May 31, 1939.

Affidavit of Francis H. Fassett

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 582

ELECTRICAL FITTINGS CORPORATION, JOSEL-
SON SALES CORPORATION, SAMUEL JOSEL-
SON and BELLE JOELSON,

Petitioners,

v.

THE THOMAS & BETTS Co. and NATIONAL
ELECTRIC PRODUCTS CORPORATION,

Respondents.

State of New York, }
County of New York, } ss.:

FRANCIS H. FASSETT, being first duly cautioned and sworn, deposes and says:

That he is an attorney at law, duly admitted and qualified as an attorney and counsellor of the Supreme Court of the United States and of counsel for the respondents in the above entitled matter.

That prior to the hearing before the District Court on April 23, 1938 on defendants' Petition for Rehearing deponent filed with the Court on behalf of the plaintiffs, respondents here, a proposed draft of final decree.

That the extracts from the minutes of the oral proceedings had on April 23, 1938 before the District Court on defendants' Petition for Rehearing, as shown in the Record (R. 289) close with the following statement by the Court

"The Court: Of course, * * * But I feel that this application must result in the denial of the petition and *the approval of the decree which has been presented* unless it is desired to have the Court consider the counter decree." (Emphasis by deponent.)

That at the hearing on April 23, 1938 upon defendants' Petition for Rehearing, the following colloquy between the Court and counsel for the defendants occurred, immediately following the foregoing statement (R. 289) by the Court:

"Mr. Crews: Your Honor, I should like to submit a counter decree.

"The Court: I will be very glad to entertain any suggestions that you may have to offer if you feel that the decree *that has been presented is not in accordance with the decision*. When will you present that?

"Mr. Crews: I can do that Monday.

"The Court: I am not particularly urging that it be done on Monday. Within the next few days would be all right." (Emphasis by deponent.)

That on Monday, April 24, 1938, and Tuesday, April 26, 1938, deponent conferred on the telephone with Floyd H. Crews, Esq., counsel for defendants, concerning the form of the decree to be entered in view of his statement to the Court at the hearing on Saturday, April 23, 1938, with the result that the words "claim 1 of" appearing in the paragraph numbered 1, R. 276, folio 828, in the body of the decree were inserted at the suggestion of deponent.

That the only other changes made in the form of decree originally filed by deponent and referred to by the Court at the close of the hearing on defendants' Petition for Rehearing, were made in the preamble thereof; and that said changes so made were such as to better reflect the filing, argument and denial of defendants' Petition for Rehearing. That as a result of deponent's telephone conferences aforesaid, with Floyd H. Crews, Esq., the final decree (R. 276) was served upon counsel for defendants, petitioners here, on which they acknowledged receipt thereof and "approved" the same "as to form" as of April 26, 1938.

Further affiant sayeth not.

FRANCIS H. FASSETT.

Subscribed and sworn to before me }
this 31st day of May, 1939. }

MARIE J. HUSSEY

Notary Public, Kings County

Kings County No. 52

New York County Clerk's No. 518

Commission expires March 30, 1940

(Seal)

Notice

IN THE

SUPREME COURT OF THE UNITED STATES

ELECTRICAL FITTINGS CORPORATION, JOSEL-
SON SALES CORPORATION, SAMUEL JOSEL-
SON and BELLE JOSELSON,

Petitioners,

v.

THE THOMAS & BETTS CO. and NATIONAL
ELECTRIC PRODUCTS CORPORATION,

Respondents.

No. 582

PLEASE TAKE NOTICE that on Thursday, June 1, 1939 respondents will submit to the Supreme Court of the United States the attached motion to tax the costs of the above case in said Court as well as in the Court below against petitioners upon the grounds set forth in said motion.

Yours, etc.,

WILLIAM BOHLEBER,
Counsel for Respondents.

Dated May 31, 1939.

GEO. WHITEFIELD BETTS, JR.,
FRANCIS H. FASSETT,
Of Counsel.

To:

MESSRS. DARBY & DARBY,
405 Lexington Avenue,
New York City.

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Service of the within and the receipt of three copies thereof is hereby acknowledged this 31st day of May, 1939.

SAMUEL E. DARBY, JR.,
FLOYD H. CREWS,
Counsel for Petitioners.



SUPREME COURT OF THE UNITED STATES.

No. 582.—OCTOBER TERM, 1938.

Electrical Fittings Corporation, Joselson Sales Corporation, Samuel Joselson and Belle Joselson, Petitioners,

vs.

The Thomas & Betts Co. and National Electrical Products Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 22, 1939.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This was a suit in equity by the respondents for alleged infringement of a patent. The District Court held claim 1 valid but not infringed and claim 2 invalid.¹ Instead of dismissing the bill without more, it entered a decree adjudging claim 1 valid but dismissing the bill for failure to prove infringement.

The respondents did not appeal, but filed in the Patent Office a disclaimer of claim 2. The petitioners appealed to the Circuit Court of Appeals from so much of the decree as adjudicated claim 1 valid. The appeal was dismissed on the ground that the petitioners had been awarded all the relief to which they were entitled, the litigation having finally terminated in their favor.² The court was of opinion that the decree would not bind the petitioners in subsequent suits on the issue of the validity of claim 1.

We granted certiorari because of an alleged conflict of decision.³

A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.⁴ But here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think

¹ 23 F. Supp. 920.

² 100 F. (2d) 403.

³ See *Oliver-Sherwood Co. v. Patterson-Ballagh Corp.*, 95 F. (2d) 71.

⁴ *Lindheimer v. Illinois Bell Tel. Co.*, 292 U. S. 151, 176.

2 *Electrical Fittings Corp. et al. vs. Thomas & Betts Co. et al.*

the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction,⁵ as we have held this court has,⁶ to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree.

The judgment is reversed, and the cause is remanded to the Circuit Court of Appeals with instructions to entertain the appeal and direct the District Court to reform its decree in accordance with the views herein expressed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁵ See 28 U. S. C. § 225.

⁶ *Gully v. Interstate Nat. Gas Co.*, 292 U. S. 16; *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U. S. 386; *William Janieson & Co. v. Morgerthau*, decided May 15, 1939.

